92-235

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

KAY BELL, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner's constitutional right to present material, exculpatory evidence was violated when the Trial Court allowed the government to withdraw a stipulation to evidence which, if believed, exonerated Petitioner where the withdrawal of the stipulation foreclosed any opportunity to present the exculpatory evidence.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed in this case:

The United States Government

Benjamin Barry Kramer

Randy Thomas Lanier

Eugene Albert Fischer

Kay Dee Bell, Jr.

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PETITION FOR WRIT OF CERTIORARI

Petitioner KAY BELL, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 30, 1992.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was decided on January 30, 1992, and

is reported at 955 F.2d 479. Petitioner timely filed petitions for rehearing and suggestions for rehearing en banc which were denied on April 14, 1992. (App. at 60a-61a).

The Petition For Certiorari was due on July 14, 1992. However, counsel for the Petitioner did not receive the Order denying the Petition For Rehearing En Banc and first learned that the Petition For Certiorari was due when co-defendants KRAMER and LANIER filed their Petition For Certiorari (July 14, 1992).

Attorneys Halprin and Peters contacted the Clerk's office for the Seventh Circuit Court of Appeals to determine why they had not received a copy of the final Order. The Clerk informed Halprin and Peters that when more than one counsel is listed on behalf of a Defendant-Appellant, only one copy of an Order may be sent and, contained in the mailing, a request that the Order be circulated to all co-counsel. Attorneys Halprin and Peters never received a copy of the Order. It appears that this situation was created by Bell's previous lawyer having not withdrawn. It was not a case of substituting attorneys because the filing of the Petition for Rehearing was a new matter.

SUPREME COURT JURISDICTION

Petitioner's conviction was affirmed by the United States Court of Appeals for the Seventh Circuit on January 30, 1992. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc which was denied on April 14, 1992. (App. at 60a-61a).

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A.

AN OVERVIEW OF THE GOVERNMENT'S CASE AGAINST PETITIONER.

In December, 1986, Charles Podesta was called by Randy Lanier, a co-defendant of Petitioner during the trial, and told that Tom (a/k/a George Brock) had something for Podesta to do. Podesta had a conversation with Tom and thereafter prepared $600,000 in twenty dollar bills to be taken to someone in San Francisco. (T. 1957). Podesta went to a Holiday Inn Motel located south of the San Francisco Airport and went to a room predesignated. Petitioner Bell was in the room although Podesta didn't know Petitioner at the time. Podesta thought the name of the man in the room was Tom. He had never seen Petitioner before that time, and Podesta didn't know what the money was for or why he was giving it to him. Podesta put the money on the bed, told Petitioner how it was packaged, left the room and returned to Fort Lauderdale, Florida the following day. (T. 1967-69).

Matthew Van Dyke, a U.S. Customs Agent, spoke with IRS Agent Charles Quarenghi on February 10, 1988. During that conversation Quarenghi gave Van Dyke a lead to investigate. (T. 6323, 6347). The lead actually came from Charles Podesta and it concerned the delivery of $600,000 to a hotel room in California. (T. 6352). Based on

this information Van Dyke testified, over objection of counsel, that he went to the Holiday Inn in Belmont, California where records for a particular room on particular dates in 1986 mentioned in the "lead information" were produced for him. (T. 6350, 6353, 6354). The phone billing records for the room at the Holiday Inn Hotel on the dates in question indicated telephone calls had been made to local phone numbers which were checked by Van Dyke. These records indicated to Van Dyke that the calls were made to a telephone registered to Petitioner. (T. 6359).

Nancy Delorme, a teller at Sea First Bank in Kenmore, Washington, issued a cashier's check in the amount of $8,000 payable to Petitioner on January 13, 1987 in exchange for $8,000 in twenty dollar bills. The purchaser was Frank Bratonia, and Delorme identified Frank Bratonia from a picture as being Petitioner Bell. She also stated that on that same day Dory Burnett purchased a cashier's check in the amount of $8,000 payable to Kay Bell, Jr. Cash was used to purchase the check.

Betty Lee Taylor, assistant service manager of the Wells Fargo Bank (which took over the Crocker Bank in 1986) stated that a cashier's check was purchased on December 4, 1986, payable to Harbor Sand & Gravel Company in the amount of $8,000. The check was issued in exchange for $8,000 in twenty dollar bills. Additionally, Taylor identified a deposit slip for Kay-Del Equipment Rental Company (Ex. 176B) which included a cashier's check from Ranier Bank for $8,000 and another from Old National Bank for $8,000, both payable to Kay Bell, Jr. She identified three cashier's checks for $8,000, two drawn on the Northwest Bank and one drawn on

Pacific First Federal Bank, all payable to Kay Bell, Jr. (T. 5422-5427). Taylor also identified two cashier's checks drawn on People's Bank for $8,000 payable to Kay Bell, Jr.; two cashier's checks in the amount of $8,000 drawn from Sea First Bank, both payable to Kay Bell, Jr., a cashier's check in the amount of $8,000 from First Interstate Bank and one from Sea First Bank for $8,000 payable to Kay Bell, Jr. and a cashier's check in the amount of $4,000 drawn on Pioneer Bank and one drawn on First Interstate Bank for $8,000. (T. 5428).

All of those checks were deposited in the Wells Fargo Bank at the same time. (T. 5431-5433). A deposit ticket showing a deposit to the account of Kay-Del Equipment Rental Equipment Company was identified. (T. 5432). The deposit slip for January 20, 1987, showed a deposit of $100,000.00. Before that deposit there was $2,173.67 in the bank. (T. 5433). One Hundred Thousand Dollars was withdrawn from the account by check on that date. (T. 5460).

Amy Evenson, who was a teller at Capital Bank of Commerce in Sacramento, issued a cashier's check on December 4, 1986, in the amount of $8,000 payable to Harbor Sand & Gravel in return for a like amount of money in twenty dollar bills.

Robert Rotundo was employed by R.J. Rotundo, Inc., a marine consulting firm. (T. 6186). In 1984, Rotundo was the debtor in possession of the Ontonagon shipyard which was purchased by Wedtech through the Bankruptcy Court in 1984. In addition to the shipyard, Wedtech purchased an integrated tug and barge. Rotundo

remained with them as a consultant and was later hired full-time. (T. 6187, 6188).

Rotundo met Petitioner Bell through a marine architect, Garcia, on December 18, 1986, when they came to Ontonagon with the intent to purchase the tug and barge. (T. 6193, 6194). That afternoon Rotundo was called and told that Fischer, a co-defendant at trial, and Petitioner were interested in paying $250,000 for the tug and barge in an as-is/where-is condition. According to Rotundo, Fischer said he would put the offer in writing. (T. 6195). Rotundo made some changes in the letter and sent it back to Fischer. (T. 6199). Fischer told Rotundo to contact Petitioner who would forward the 10% down payment. (T. 6200). Rotundo's letter told them to make the check payable to Wedtech of Michigan, Inc. and the creditors committee for the United States Bankruptcy Court, Western District of Michigan, Case No. M83-00107.

Rotundo received the check on January 5, 1987. (T. 6202-6204). Rotundo received two checks in final payment for the barge, one in the amount of $125,000 and one for $100,000. (T. 6223). Both of the checks were made out to Wedtech of Michigan, Inc. and the creditors committee, United States Bankruptcy Court, Western District of Michigan. (T. 6224-6225). The bill of sale for the barge was made out to Ontonagon Barge Line, Inc., a corporation formed by Petitioner and others. (T. 6230).

Ayako Marshall, an employee of Sanwa Bank of Sacramento, California, identified a $25,000 cashier's check issued by that bank on December 29, 1986, payable to Kay Bell. The check was issued in exchange for $9,000 in cash and a cashier's check drawn on Sacramento Commercial

Bank payable to Petitioner dated December 29, 1986, and one for $8,000 from Security Pacific Bank payable to Petitioner and dated December 29, 1986. (T. 6167, 6172, 6174). The $25,000 check was made payable to Wedtech of Michigan, Inc. and their creditors committee. (T. 6175).

Deputy Sheriff Mark Hanlon of San Mateo County, California (T. 5484) was assigned to the San Francisco International Airport working with the federal drug task force in San Francisco. (T. 5488). On February 11, 1987, while on duty, a U.S. Customs Agent called him (T. 5490) after which he went to the International Terminal Building where he observed Petitioner go through the magnetometer. (T. 5494). The customs agent and task force agent were talking to Bell who had a briefcase with $50,000 in cash. Petitioner told him that the money was to be used to purchase rock crushing equipment for his sand and gravel business. The purchase would be made in either Germany or Switzerland. The rock crushing equipment Petitioner said he was going to purchase was backed up by documentation. Petitioner had not filled out the form CMIR (needed for one to take money out of the country) that day, but he filled out the form before leaving the next day. (T. 5495-5506).

James Blair, who had been involved in illegal marijuana trafficking for which he pleaded guilty (T. 2241-2244), stated that in 1986, he went to a sand and gravel yard in California where he saw a man identified as Petitioner helping a crane operator guide containers onto the rear of a trailer. According to Blair, Petitioner was assisting in lining up the containers to make sure that they were properly on the pins that were needed because the ground was not level. According to Blair,

Petitioner didn't appear to be real conscious of what he was doing because he kept putting his hands under the container which weighed about 5,000 pounds empty and 15,000 pounds with marijuana in them. Blair stated he told Petitioner to keep his hands on the side of the container so he could move them more efficiently without hurting himself. Petitioner did not say anything to him, but according to Blair, Petitioner seemed to be in a hurry and in an excited state of mind. According to Blair, Petitioner helped him put two containers in Blair's truck, but Blair did not see him help anyone else. He did not see Petitioner at any other time. (T. 2507-2509). Blair stated that there was a lot of activity going on as the area was an "ongoing sand and gravel operation." (T. 2501).

William Bohannon was also present at the sand and gravel yard in 1986 and told the jury that the man who owned the boat yard was screaming and hollering at everybody when they were loading and unloading a barge. According to Bohannon, the owner was present for at least an hour but really didn't participate in the loading and unloading but rather, "he was trying to help guide the things on the trailer." He identified Petitioner as the person yelling at the individuals. (T. 6525, 6527, 6529-6530).

Ronald Valentine was also present at the yard in 1986. He testified that George Brock had driven him and others to the sand and gravel yard to unload the containers from the barge. As they had no way to return to their hotel, they were given a lift by a worker at the yard "who I presumed was the owner of the yard." Valentine thought his name was Kay. He presumed he was the owner of the yard because he was very nervous and

wanted to know if any of the workers had asked anything or had been concerned about his transferring the seagoing containers. (T. 8515).

There was no direct evidence, either by co-conspirators statements through F.R.E. 801(d)(2)(e) or otherwise, that Bell had any knowledge concerning the importation and distribution of marijuana.

B.

THE FACTS DIRECTLY RELATING TO THE ISSUE PRESENTED

William Palumbo was a front man for the alleged enterprise who reserved dock space in San Francisco and New Orleans to facilitate the transportation of drugs. (A. 49). Before trial, Palumbo, who then was a co-defendant along with Petitioner, Lanier, Fischer and Kramer, agreed to provide a proffer to the F.B.I. The proffer was given to "demonstrate to the government that he [Palumbo] would be a cooperative witness." (A. 49). Palumbo told the F.B.I. that Petitioner "was unaware of any illegalities". (A. 49).

During pretrial proceedings concerning a request to sever Palumbo's trial from the other defendants, counsel for the government agreed to stipulate to Palumbo's statement about Petitioner. (A. 49, 50). The prosecutors stated that Palumbo's statement could "be introduced for" Petitioner. (A. 50). Petitioner's counsel agreed to accept the stipulation and the trial court said "okay." (A. 50). Eventually, Palumbo's motion for a severance was granted. There was no further discussion of the stipulation during the pretrial proceedings. (A. 49-51).

The next time the issue arose was when Petitioner's counsel moved for admission of the stipulation. (A. 50). By then the trial was nearing completion and the Government opposed admission of Palumbo's proffer. (A. 50). The District Court "concluded that the government had entered into a stipulation with counsel for Bell." (A. 50). Palumbo was subpoenaed by counsel for Bell. Palumbo's counsel filed an Affidavit with the District Court advising it that Palumbo would not testify without a further grant of immunity. (P.T. 1387, T. 9678-9682). However, the District Court refused to require the government to follow through on its promise to stipulate. (A. 51). The District Court, and later the Court of Appeals, found that the Palumbo proffer "was helpful to Bell." (A. 51). But each Court also found that it was within the District Court's broad discretionary powers to deny enforcement of the stipulation. (A. 51). For that reason, the Court of Appeals held that the District Court's decision could be overturned "only where the court has clearly and unmistakably abused its discretion." (A. 51, 52).

The Court of Appeals found, as the District Court also had, that the Government stipulated pretrial to avoid a severance of Palumbo's case. When the issue arose at trial, Palumbo was no longer a co-defendant. This change in circumstance warranted withdrawal of the previous offer to stipulate, according to the Court of Appeals. (A. 52). In reaching this conclusion, the Court of Appeals also found that admission of the Palumbo proffer would not have affected the outcome of the trial.

From this ruling, Petitioner seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE DISTRICT COURT ALLOWED THE GOVERNMENT TO WITHDRAW A STIPULATION THEREBY PREVENTING PETITIONER FROM PRESENTING MATERIAL, EXCULPATORY EVIDENCE.

Nothing is more firmly rooted in the notions of due process than the fact that federal prosecutors function at two levels. The first or paramount level is the one which imposes upon the prosecutor an absolute responsibility not to compromise the defendant's constitutionally protected rights to a fair trial. A prosecutor is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

> Whenever a prosecutor violates a fundamental right of the accused, he not only violates the Constitution he also undermines the prosecutorial function. Here, the prosecutors violated their duty to the Court and their office and, more important, they violated Defendant's constitutional rights.

The right to present a competent and complete defense is fundamental to our adversarial system. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799 (1963). This right includes the effective assistance of counsel (*Gideon, supra*), the opportunity to confront and cross-examine witnesses (*Pointer v. Texas*, 380 U.S. 400, 13 L.Ed.2d 923 (1965)), a speedy and public trial (*Kopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed.2d 1 (1967)), and the right to offer

testimony and evidence which supports the defense. *Washington v. Texas,* 388 U.S. 14, 18 L.Ed.2d 1019 (1967).

The jury's duty is to weigh the facts and decide where the truth lies, a duty which is best served by allowing the jury to hear all relevant evidence. *See, In re Oliver,* 333 U.S. 257, 92 L.Ed. 682 (1948). As the Supreme Court explained in *Washington*:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington,* 388 U.S. at 19.

Any ruling which bars relevant testimony has the "effect of suppressing the truth. . . . " *Id.* at 20, which is "more likely to be arrived at by hearing the testimony of all persons who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury. . . . " *Rosen v. United States,* 245 U.S. 467, 62 L.Ed. 400 (1944). (McCormick is often quoted as saying: "To be relevant evidence need only be a brick, not a wall.") In *Washington, supra,* the Supreme Court held that a state rule which barred admission of defense evidence that another person had committed the crime was unconstitutional. The same principle applies to Defendant's case.

The right to present relevant evidence is a fundamental right which cannot be usurped by the prosecution.

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973). To protect this fundamental right the prosecution is required to disclose favorable evidence, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963); *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347 (1980), even when no request for the exculpatory evidence was made by the defense. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342 (1976). While these cases distinguish specific requests for particular types of exculpatory evidence from cases where no request is made, ultimately the prosecutor's duty hinges on the "character of the evidence, not the character of the prosecutor." *Agurs, supra*, 427 U.S. at 110. Thus, the Court in *Agurs* held there are situations where the "evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." *Id.*

Prosecutors also are constitutionally required to preserve evidence which might prove useful to the defense. *California v. Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413 (1984). There is a qualified privilege of non-disclosure of the name and whereabouts of an informant. But the scope of this privilege is carefully limited by its underlying purpose. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense . . . the privilege must give way." *United States v. Roviaro*, 353 U.S. 53, 1 L.Ed.2d 639, 645 (1957).

The access to evidence cases take precisely the same approach. *See, United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). In *Valenzuela-Bernal*, the defendant was charged with illegally importing aliens. When he was arrested three passengers were in defendant's car. Before

trial two of the three passengers were deported at the request of the government. The defendant moved to dismiss on the grounds that he was denied the opportunity to call the deported passengers to testify. In response, the government agreed to stipulate that the deported passengers would testify that they had not told defendant they were illegal aliens. This offer was declined by the defendant, and the motion to dismiss the indictment was denied.

When the case reached the United States Supreme Court it affirmed the defendant's conviction. The Court explained that a defendant cannot "establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony." 458 U.S. at 867. To establish a constitutional violation the defendant had to "at least make some plausible showing of how their testimony would have been both material and favorable to his defense." *Id.* Because the defendant in *Valenzuela-Bernal* could not demonstrate what the deported witnesses would say or how their testimony would help him, his constitutional rights were not violated.

The same result was reached in *California v. Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413 (1984). There the defendants were charged with drunk driving based, in part, on breath test results. Before trial the defendants requested the unused breath samples so their experts could test them. Unfortunately state officials routinely disposed of the samples shortly after the state's test was run so there was no sample left for the defense to test. This inadvertent destruction of evidence did not violate the defendants' constitutional rights in *Trombetta*. To establish a

constitutional violation, the Court held, the destroyed evidence "must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 488.

These access to evidence cases are applicable to Defendant with one significant difference. Unlike *Trombetta,* Defendant has established precisely what the evidence was and that evidence was unquestionably exculpatory. To sustain its burden the government had to prove beyond a reasonable doubt that Defendant had knowledge of the common purpose of the conspiracy. *Direct Sales Co. v. United States,* 319 U.S. 703 (1943). William Palumbo was a major player in the alleged conspiracy according to the government. The government maintained that Palumbo was the "front man" for the organization and more specifically that Palumbo arranged dock space in New Orleans and San Francisco.

Given this theory of the conspiracy, Palumbo would know who was involved in the conspiracy particularly as it related to shipments in those two cities. F.B.I. agent Larry Smith took a pretrial proffer from Palumbo which, among other things, dealt with Palumbo's knowledge of the conspiracy in those cities and who was involved in shipments to or from those cities. In his proffer Palumbo told agent Smith that Defendant "was unaware of any illegalities." (K.H. 1067). This statement went to the core of Defendant's case and was consistent with Defendant's innocence. Moreover, the government conceded that Palumbo's proffer was exculpatory, as it related to Defendant, and agreed to stipulate to it.

Thus, Defendant had a constitutional right to present Palumbo's testimony and the government's interference with that right cannot be tolerated. *Chambers, supra.*

It is of course the position of petitioner here that the trial, the district court and the appellate court erred in finding the trial court had discretion to relieve the government here from its pretrial stipulation (promise) that certain evidence favorable to the petitioner would be admitted. This promise operated as an inducement of the petitioner not only to not file for severance but to not pursue and secure the testimony of the co-defendant Palumbo. The question of how a breach of the prosecutor's promissory agreement which induces from the accused to do or not do something was resolved in *Santabello v. New York,* 404 U.S. 257 (1971). In *Santabello,* defendant withdrew a previously entered plea of not guilty and entered a plea of guilty to a lesser charge. The basis of the defendant's changing his plea to a lesser offense was that the prosecutor had agreed to make no recommendation as to the sentence.

Because of a series of delays a new prosecutor appeared at the last date set for sentencing. That prosecutor recommended a one year sentence. *Santabello*'s counsel immediately objected and in support of that objection noted the previous prosecutor's promise to the defendant. Most important to the present litigation is the fact that the sentencing judge made it abundantly clear on the record that he was not at all concerned with the new district attorney's recommendation. As far as the sentencing judge was concerned, on the basis of the defendant's prior record and the presentencing report the judge felt constrained to impose the maximum sentence. *Id.* at 260.

The Supreme Court reversed. This, despite the fact that it was obvious that the judge was in no way influenced by the second district attorney's remarks. This, despite the fact that the sentence imposed was fully within the court's discretion. The Supreme Court dealt with these issues by opining:

> We need not reach the question where the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude the interest of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation the pleas of guilty will be best served by remanding the case. *Id.* at 262.

Petitioner means to suggest here that the government's promise was indeed no less significant. The truthful acknowledgement made under the circumstances of a proffer to a federal prosecutor that Bell did not have knowledge of the conspiracy to possess and distribute marijuana was testimony on a matter that was invaluable to his defense. The prosecutor acknowledged in Bell's case that the existence of the statement was *Brady* material. The Appellate Court conceded in their opinion that it was evidence that would be of "some value" to Bell.

The fairness which drives the *Santabello* opinion similarly here dictates that the government may not unilaterally abandon its agreement because at a later time it finds it inconvenient to fulfill its obligation. Bell and his attorney were thoroughly justified in relying on the prosecutor's original stipulation. The prosecutor did not serve

in any way shape or form notice until very late in the trial that it would seek to undermine its stipulation. It does not matter in the slightest that at a later date but prior to the time defendant sought to introduce this stipulation Palumbo was no longer a defendant. As previously indicated, Bell's attorneys, acting in reliance on the prosecutor's promise surrendered their opportunity to perfect Palumbo's testimony to be introduced at trial. Under such circumstances the trial judge is without discretion.

The judge is required to enforce that obligation and admit the evidence. In a similar vein if confronted with a *Brady* violation during trial the judge is without discretion to determine whether and to what extent the material is of value to the defendant. Rather the trial judge is obliged to order its immediate production. In the event the material revealed requires time to be assimilated and incorporated into the defense case for strategy, the trial judge would be similarly bound to enter a continuance for a reasonable period of time so the defendant could perfect the material wrongfully withheld from him.

It is important to note that the appellate court relied on a civil case to support the proposition that the trial judge had discretion. The distinction is obvious. The Constitution does not protect the rights of civil litigants in the same manner as criminal defendants. The government's withdrawal of the stipulation constituted a gross interference with Bell's right to fairly present a defense. The trial judge's acquiescence to the government misconduct was mistakenly based on his failure to recognize that the matter was constitutional and not merely evidentiary.

There was more than a "reasonable probability that, had the evidence been [available] to the defense the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, at 682 (1985).

The Government's conduct coupled with the acquiescence of the Trial Court resulted in the actual suppression of evidence favorable to the Petitioner.

It cannot be denied that the Government achieved a statement favorable to the Petitioner through granting William Palumbo limited immunity for the purposes of securing information through his proffered statement to an FBI agent. It is also beyond dispute that the evidence was favorable to the Petitioner. At the time Petitioner's counsel sought to introduce or have the Court enforce the stipulation, the Court was aware that Palumbo would not testify without a further grant of immunity. The Trial Court's failure to recognize this situation as being one of constitutional dimension requiring enforcement of the stipulation coupled with the Government's cavalier conduct in disavowing the stipulation, denied to the Petitioner his opportunity to have a new trial.

The Trial Court, here, was not required to go through the delicate and to say the least limited exercise of granting immunity to Palumbo on its own authority. The Trial Court had a far more simple option. It could have and should have enforced the Government's promises as per the original stipulation.

CONCLUSION

This Court should not permit transgressions of this nature to pass without remediation. A criminal defendant's rights to a fair trial cannot ever be the subject of the Government's whim and caprice. In the event that occurs, as it did in this case, it is the absolute obligation of the Trial Court to remedy the error. The combined action of the Government and the Trial Court left the Petitioner without the availability of Mr. Palumbo who was willing to testify if granted immunity. This testimony could have been received by the jury if the Court merely enforced the Government's promise.

For the reasons stated above, this case should be reversed and remanded for a new trial.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-3444, 88-3445, 88-3446,
89-1025 & 89-2752

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BENJAMIN BARRY KRAMER,
RANDY THOMAS LANIER,
EUGENE ALBERT FISCHER, and
KAY DEE BELL, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois.
(No. 87 CR 40070)

(April 20, 1990)

Before CUMMINGS, CUDAHY and KANNE, Circuit Judges. KANNE, Circuit Judge:

Appellant Randy Thomas Lanier was a rising star on the auto-racing circuit in the early 1980's; indeed, in 1985, he was the rookie of the year at the Indianapolis 500. Lanier apparently did not regard auto racing as a full-time job. Together with appellants Benjamin Barry Kramer, and Eugene Albert Fischer, he directed a vast enterprise

which imported several hundred thousand pounds of marijuana into the United States in the 1980's. Appellant Kay Dee Bell, Jr. assisted the enterprise in importing two loads of marijuana.

A jury found Lanier, Kramer, Fischer and Bell guilty to conspiring to distribute marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1). The jury also found that Lanier, Kramer and Fischer had participated as principal administrators, organizers, or leaders of a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. Finally, the jury found Lanier guilty of conspiring to defraud the United States under 18 U.S.C. § 371 by impeding the United States in its assessment and collection of revenue.

As required by § 848(b), Lanier, Kramer and Fischer were each sentenced to a mandatory term of life imprisonment without possibility of parole. Pursuant to §§ 846 and 841(a)(1), Lanier and Kramer were sentenced concurrently to forty years imprisonment, Fischer was sentenced concurrently to thirty-five years imprisonment, and Bell was sentenced to twenty-five years imprisonment. Lanier was also sentenced to serve five years for the violation of § 371, to run consecutively to his sentence under §§ 846 and 841(a)(1). In addition, forfeiture judgments were entered against Lanier and Kramer in the amount of $60,000,000 each and against Fischer in the amount of $30,000,000. Appellants raise numerous challenges to their convictions. We find their arguments unpersuasive and affirm in all respects.[1]

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[1] Lanier does not appeal his tax fraud conviction pursuant to 18 U.S.C. § 371.

I.

In 1982, Lanier and Kramer formed a partnership which purchased marijuana from sources in Columbia and imported it to the United States through several locations. Kramer arranged to have marijuana brought from Columbia to Florida on his boat, the "Ursa Major," while Lanier provided the initial financing for the purchase of the marijuana and distributed it to his customers upon arrival. The enterprise established by Lanier and Kramer imported two boatloads of marijuana on the "Ursa Major" to Melbourne Beach, Florida from Columbia.

The partnership's first transaction took place in April, 1982 when Lanier and Kramer arranged to bring 15,000 pounds of marijuana from Columbia to Melbourne Beach, Florida. Kramer and Lanier arranged for the load to be picked up in Columbia, unloaded in Melbourne Beach, and then distributed. Lanier purchased boats to ferry the marijuana from the "Ursa Major" to the beach where Kramer coordinated the unloading of the marijuana into waiting vans. A second load of 20,000 pounds of marijuana was imported in the same manner in August, 1982. Some of the marijuana from this load was purchased by a co-conspirator, Conrad Ingold, and was delivered by him to the Stauton, Illinois area.

Fischer joined Lanier and Kramer in orchestrating the next five transactions, in which a tugload and four barge loads of marijuana, were brought into the United States. In the third transaction, which took place in the Spring of 1983, Lanier, Kramer and Fischer imported 30,000 pounds of marijuana into Bridgeport, Connecticut and arranged its distribution. In the Fall of 1983, they brought a barge

load of approximately 14,000 pounds of marijuana to New York. Again, Lanier and Kramer set up its importation and distribution. Some of the marijuana from that load was transported to the St. Louis area for distribution.

In the fifth transaction, which took place in 1984, Lanier, Kramer and Fischer brought a bargeload of 147,000 pounds of marijuana to San Francisco. Bell, who owned Harbor Sand and Gravel Yard, located in San Francisco, assisted the enterprise in unloading the barge and transporting its contents to customers. Bell's tugboat brought the barge, upon its arrival in San Francisco, to his Sand and Gravel Yard where it was unloaded. Bell also helped Lanier and Kramer arrange the transportation of the marijuana from the Yard. Some of the marijuana imported in the San Francisco load was delivered by customers of Lanier and Kramer to Millstadt, Illinois. Over $50 million was received from the sale of that load of marijuana.

The sixth transaction took place in the Spring of 1985. Lanier, Kramer and Fischer imported a bargeload of approximately 152,000 pounds of marijuana to New Orleans. Kramer was responsible for the purchase of the marijuana in Colombia while Fischer rented dock space in New Orleans and arranged to bring the barge to the dock. Lanier directed the unloading of the barge. Customers of the enterprise shipped some of the marijuana in that load to Millstadt, Illinois.

The seventh transaction occurred in November 1986. The appellants imported a bargeload of approximately 130,000 pounds of marijuana to San Francisco. Kramer

sent an agent to Colombia to acquire the marijuana. When the load arrived, Bell arranged for the cover load of lumber to be unloaded from the barge. Fischer provided workers who removed the marijuana from the secret compartments of the barge and placed it in containers which were loaded onto flatbed trailers at Bell's Sand and Gravel yard. Bell also assisted Fischer in loading the containers onto the flatbed trailers. Lanier and Kramer were principally responsible for transporting the marijuana from the Sand and Gravel yard. The enterprise collected $34,795,000 from this load. Kramer received $12,500,000, while Fischer split $10,253,000 with George Brock.[2] Lanier received the balance of the proceeds.

II.

[1] Lanier, Kramer and Fischer raise two objections to their § 848 convictions based on the premise that § 848(b) is a substantive offense. They argue that their § 848 convictions violated the constitutional prohibition on ex post facto laws.[3] They also argue that their

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[2] George Brock (a/k/a "Tom") was indicted with the appellants for engaging in a CCE as a principal administrator, organizer, or leader but did not stand trial because he remained a fugitive from justice.

[3] All citations to and quotations from § 848 hereinafter referred to that statute as applicable here. Section 848 was substantially amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, but those amendments are not pertinent to this opinion.

constitutional rights to be tried in the district in which the § 848 offense was committed were violated. As we shall explain, both of these objections fail.

First, we consider the appellants' ex post objection to their convictions, under § 848, for being the principal administrators of a CCE. Specifically, the appellants object to the district court's instructions on certain elements of § 848.

There are several elements necessary for a conviction under § 848 and other factors which require the application of § 848(b). First, the government must prove that the defendant engaged in a CCE. See § 848(d). Under § 848(d) a person is engaged in a CCE if:

(1) he violates any provision of this subchapter or subchapter 11 of this chapter the punishment for which is a felony, and (2) such violation is a part of the continuing series of violations of this subchapter or subchapter 11 of this chapter – (A) which are undertaken by such person in concert with five or more other persons with respect to whom such persons occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

§ 848(d). Section 848(a) sets forth the penalties for some of the persons who are found to have engaged in a continuing criminal enterprises under § 848(d). Section 848(a) provides that "[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment . . . . " Section 848(b), which became effective on October 27, 1986, is titled "Conditions for life imprisonment for

engaging in continuing criminal enterprise." It provides for a mandatory life sentence for a person engaging in a CCE if:

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and (2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million in gross receipts during any twelve month period of its existence for the manufacture, importation or distribution of a substance described in Section 841(b)(1)(B) of this title.

On the application of § 848(b) the district court instructed the jury that:

To sustain the charge of being a principal administrator, organizer, or leader of a continuing criminal enterprise prove, in addition to the fact that the defendant was engaged in a continuing criminal enterprise, the following propositions:

First, that a defendant was the principal administrator, organizer, or leader of the continuing criminal enterprise or was one of several such principal administrators, organizers, or leaders of a continuing criminal enterprise that continued after the effective date of the statute, October 27, 1986:

Second, that after October 27, 1986, a defendant committed a *violation* of importing marijuana, distributing marijuana or conspiracy to distribute marijuana as charged which involved at least 30,000 kilograms (66,000 pounds) of marijuana[;] or that the enterprise in which a

defendant was a principal or one of several principal administrators, organizers, or leaders received $10 million in gross receipts between October 27, 1986, and including February 1987, for the importation or distribution of marijuana.

The district court instructed the jury on the continuing series element of § 848(d) that:

Thus, you must find beyond a reasonable doubt that the defendant is guilty of conspiracy to distribute more than 1,000 pounds of marijuana as charged in Count II and/or that he is guilty of knowingly and intentionally distributing marijuana or importing marijuana as set forth in paragraphs A though R of Count I of the Indictment and that this conduct, together with any additional violations of the drug laws constituted a total of three or more violations of the federal drug laws committed over the period of time charged in Count I with a single or similar purpose. This will constitute a finding that a defendant engaged in a continuing series of violations.

Appellants contend on appeal that § 848(b) is a substantive offense, and is not a sentencing enhancement provision. The government disagrees. The appellants maintain that if we agree that § 848(b) is a separate substantive offense, their convictions violate the ex post facto clause because the continuing series instruction did not require the jury to find that the appellants engaged in two predicate acts after October 27, 1986, the effective date of § 848(b). They argue that the § 848(b) instruction was also defective because it required the jury to find only after § 848(b) became effective, a defendant committed one violation of importing, distributing, or conspiracy to distribute marijuana or that the enterprise received $10

million in gross receipts from the importation or distribution of marijuana between October 27, 1986, and February, 1987.

The appellants principally rely on *United States v. Torres*, 901 F.2d 205 (2d Cir.), *cert denied*, ___ U.S. ___, 111 S.Ct. 273 (1990) for the proposition that § 848(b) is a substantive offense, and not a sentencing enhancement provision. We do not believe that § 848(b) is a substantive offense. *See United States v. Lowe*, 860 F.2d 1370, 1377 (7th Cir. 1988), *cert denied*, 490 U.S. 1005, 109 S.Ct. 1639 (1989), and *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 106 S.Ct. 2411, 2419 (1986), but we find that we do not need to reach that issue.[4] Assuming, *arguendo*, that § 848(b) is a

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[4] Section 848(b) appears to us to be a sentencing enhancement provision under the analysis set forth in *Lowe*. 860 F.2d at 1377. The test set forth in *Lowe* was designed to determine whether Congress intended to create a separate offense or a sentencing enhancement provision. First, the title of § 848(b), "Conditions for Life Imprisonment for Engaging in a Continuing Criminal Enterprise," and the titles of the preceding bills indicate that it is a sentencing enhancement provision. Second, § 848(b) contains an explicit reference to conviction under the predicate provision § 848(d). Third, the penalty contained in § 848(b), while not a multiplier of the penalty for violating § 848(a), merely limits the district court's discretion in sentencing within the range set forth in § 848(a). Fourth, although § 848(b) does not contain procedures for a separate hearing to determine if the enhancement factors are present, it resembles several other sentencing enhancement statutes, including 21 U.S.C. § 841(b) and 18 U.S.C. § 2113, which do not require a hearing. Indeed, we have recently questioned the need to examine statutes for hearing provisions. In *Lowe*, we held that 18 U.S.C. § 924(e), which does not contain a provision for a separate hearing on the enhancement factors, is a sentencing

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substantive offense, the appellant's ex post facto objections to their convictions must fail because they engaged in a continuing offense.

It is well settled that the ex post facto clause is not applicable to offenses which began before the effective date of a statute and continue thereafter. *See United States v. Baresh*, 790 F.2d 392, 404 (5th Cir. 1986) ("because conspiracy is a continuing crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not offend the [ex post facto clause]"); *United States v. Ferrara*, 458 F.2d 868, 874 (2d Cir.), *cert denied*, 408 U.S. 931, 92 S.Ct. 2498 (1972); *United States v. Pace*, 898 F.2d 1218, 1238 (7th Cir.), *cert denied*, ___ U.S. ___, ___ U.S. ___, 110 S.Ct. 3286, 111 S.Ct. 210 (1990); *United States v. Canino*, Nos. 89-1719, 89-1721, 89-1740 & 89-1746, slip op. at 40-41 (7th Cir. Nov. 27, 1991). The appellants argue that a CCE can only become a continuing offense if the government demonstrates that the defendant engaged in a continuing series of violations after the effective date of § 848(b).

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enhancement provision. Id. at 1378. *See also, United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989) (§ 841(b) is a sentencing enhancement provision). The Sentencing Guidelines, which took effect on November 1, 1987, clearly contemplate a sentencing hearing under rule 32 of the Federal Rules of Criminal Procedure for all convictions to determine whether enhancement factors are present. Because of the elaborate procedures established by the Sentencing Guidelines for determining enhancement factors, it is no longer appropriate to examine recently enacted statutes for a hearing requirement to determine whether Congress intended to enact a sentencing enhancement provision coupled with a substantive offense.

We disagree. In *Pace,* we held that a CCE, like a conspiracy, is a continuing offense. 898 F.2d at 1238. We noted that a CCE and a conspiracy are similar crimes because both punish agreements to commit crimes and both involve continuing conduct. *Id. See also United States v. Johnson,* 537 F.2d 1170, 1175 (4th Cir. 1976) (holding that the original version of § 848 could be applied to enterprises beginning before its effective date, but which continued thereafter). *Pace* requires that only the government prove that the enterprise continued until after October 27, 1986, the effective date of § 848(b). *Pace,* 898 F.2d at 1238. There is no requirement that the government prove that the appellants engaged in two predicate acts after the effective date of § 848(b). *See id.; Canino,* slip op. at 41 (holding that the government need not prove the defendant's involvement in a conspiracy after the effective date of an enhanced penalty provision). The instruction given by the district court required that the jury find that the appellants engaged in a CCE until after the effective date of § 848(b). The evidence was sufficient to show that the appellants engaged in a CCE from 1980 until February 1987, long after the effective date of § 848(b). Thus, we hold that the appellants engaged in a continuing offense.

Torres, in which § 848(b) convictions were found to violate the ex post facto clause, is not to the contrary. The instructions in *Torres* allowed the jury to apply § 848(b) if they found that the appellants were principal administrators, organizers, or leaders of the organization "sometime during the 12 month period from June 24, 1986 to June 23, 1987." 901 F.2d at 226. The second circuit held that the instruction violated the ex post facto clause, *id.* at 227,

because the jury was not required to find that the appellants engaged in a continuing offense. The court further held that there could not have been a continuing offense because the jury was not instructed that the appellants had to function as principal administrators, organizers, or leaders of the Torres organization after § 848(b) became effective. *See id.* By contrast, the district court's instruction in this case required the jury to find that the appellants had been the principal administrators, organizers, or leaders of a criminal enterprise that had continued after October 27, 1986, the effective date of § 848(b). Thus, the instruction required the jury to find that the appellants continued to violate § 848 after the penalty for violating that statute was increased. The appellants, unlike the defendants in Torres, cannot complain that the jury might have found that they stopped acting as principal administrators after § 848(b) became effective.[5]

The appellants also claim that venue did not lie in the Southern District of Illinois for the offense of violating

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[5] The appellants argue in their reply briefs that if § 848(b) was a substantive offense it was plain error for the district court to fail to instruct the jury that it could find the appellants guilty of violating § 848(a). The appellants' theory is that if the jury was required to determine whether the appellants met the requirements for a life sentence under § 848(b), it should have been able to decide that the appellants have violated only § 848(a). At the instruction conference, the district court asked the appellants whether they wanted the jury to be instructed that it could find the appellants had violated only § 848(a) in addition to the instruction on § 848(b). Kramer and Lanier expressly stated that they did not want a lesser included offense instruction on § 848(a), while Fischer remained silent. Therefore, the appellants have waived this issue.

§ 848. *See* U.S. Const. amend VI; Fed. R. Crim. P. 18. The appellants argue that because none of the predicate acts occurred in the Southern District of Illinois after the effective date of § 848(b), they were convicted in violation of their right to be tried in a district in which their crimes were committed. Because the appellants engaged in a continuing offense,* venue may be established by proof that any act in furtherance of the CCE took place in the Southern District of Illinois. *See United States v. Molt*, 772 F.2d 366, 369-70 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458 (1986); *United States v. Lewis*, 797 F.2d 358, 366-68 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093, 107 S.Ct. 1308 (1986). At trial the government offered testimony to show that the appellants provided large quantities of marijuana to their dealers in East St. Louis and Southern Illinois areas. Indeed, the appellants do not contest the adequacy of this evidence on appeal. The evidence was more than adequate to establish venue.

III.

Lanier, Kramer and Fischer raise several other objections to their § 848 convictions. They first argue that the district court's instructions erroneously permitted the jury to rely upon the conspiracy charge as one of the continuing series of violations that § 848 requires for conviction. In *United States v. Baker*, 905 F.2d 1100, 1104

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* The Court's original opinion read: "Since § 848(b) is a sentencing enhancement provision, . . . " The Court amended its opinion in its order denying appellants petitions for rehearing and suggestions for rehearing en banc. See (App. at 60a-61a).

(7th Cir. 1990), *certs denied*, ___ U.S. ___, ___ U.S. ___, ___ U.S. ___, 111 S.Ct. 206, 111 S.Ct. 270, 111 S.Ct. 686 (1990), we held that a conspiracy may not be included as one of the crimes making up the continuing series necessary for a CCE conviction. We also held, however, that "a series may be established by two or more substantive drug offenses." *Id.* at 1104. *Baker* obligates us to affirm the convictions of the appellants because the indictment alleged that each appellant was involved in more than two substantive drug offenses. The indictment charged Lanier and Kramer with involvement in seven substantive drug offenses, while Fischer was charged with five substantive offenses. These offenses were more than adequate to meet the continuing series requirement of the CCE charge.

Lanier, Kramer, and Fischer contend that the jury should have been instructed that it must unanimously agree as to each of the two or more predicate offenses constituting the "continuing series" element of the charge. Federal Rule of Criminal Procedure 31 requires, and the district court gave, a general unanimity instruction. *See* Fed.R.Crim.Pro. 31. The appellants principally rely on *United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir. 1988), which held that, in a § 848 case, the jury should be instructed that it must unanimously agree on the acts which constitute the continuing series of violations. This Court has expressly declined to follow *Echeverri*. In *Canino*, slip op. at 34, we held that "[t]he constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE

trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses." *See also United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S.Ct. 1202 (1986) (holding that under § 848 the jury was not required "to agree unanimously on the identity of at least five people who acted under [a defendant's] supervision"); *United States v. Bond*, 847 F.2d 1233, 1237 (7th Cir. 1988). The general unanimity instruction required the jury to find that the appellants committed at lest *three* predicate acts. Thus, the appellants' unanimity argument is unavailing.

Lanier, Kramer and Fischer argue that the district court's instructions on the CCE count constructively amended the indictment. The court instructed the jury that it could find that the appellants engaged in a continuing series of violations based upon the various predicate acts set forth in the indictment, "*together with any additional violations of the drug laws*" (emphasis added). The appellants object to the italicized portion of the instruction on the ground that it subjected them to further controlled substance violations beyond those which were charged in the indictment. *See Stirone v. United States*, 361 U.S. 212, 215-18, 80 S.Ct. 270, 272-74 (1960). The Supreme Court has long held that every defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller*, 471 U.S. 130, 140, 105 S.Ct. 1811, 1817 (1985) (quoting *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273). A constructive amendment of an indictment occurs when the evidence introduced by the prosecution broadens "the possible bases for conviction from that which appeared in

the indictment." *Miller*, 471 U.S. at 138, 105 S.Ct. at 1816. A constructive amendment of the indictment may also occur if the district court's instructions to the jury broaden "the possible bases for conviction." *Id.; United States v. Keller*, 916 F.2d 628, 632-36 (11th Cir. 1990), *cert. denied*, ___ U.S. ___ 111 S.Ct. 1628 (1991). It is well settled that "[a] judicial amendment of the indictment, whether implicit or explicit, is *per se* reversible error." *United States v. Galiffa*, 734 F.2d 306, 311 (7th Cir. 1984); *United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985).

The appellants contend that the trial court's instructions broadened the possible bases for their CCE convictions by including new predicate acts which were not listed in the indictment. They contend that it is possible that the jury found the appellants were principal leaders or administrators of a CCE based on the new predicate acts that were not alleged in the indictment.

We disagree with the appellants' contention that the trial court's instruction broadened "the possible bases for conviction from that which appeared in the indictment," *Miller*, 471 U.S. at 138, 105 S.Ct. at 1816 (1985), because the appellants misinterpret the requirements for a conviction under § 848. Numerous courts, including this one, have allowed proof of overt acts in violation of the drug laws, although those acts were not specified in the indictment, to sustain a § 848 charge. In *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), *cert denied*, 420 U.S. 962, 95 S.Ct. 1351, 421 U.S. 949, 95 S.Ct. 1682 (1975), the court stated that an indictment charging a violation of § 848 need not "specify each violation constituting the continuing series of violations proscribed by the statute." *See also, United States v. Young*, 745 F.2d 733, 747 (2d Cir.

1984), *cert denied*, 470 U.S. 1084, 105 S.Ct. 1842 (1985) ("in order to support a § 848 charge, the government is not required to plead in any form, much less obtain convictions on, any of the eligible predicate offenses, but may instead simply prove at trial the continuing series of offenses."); *Baker*, 905 F.2d at 1103 (same); *Markowski*, 772 F.2d 358, 361-62 (same); *United States v. Alvarez-Morreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert denied*, ___ U.S. ___, 110 S.Ct. 1484 (1990); *United States v. Sterling*, 742 F.2d 521, 526 (9th Cir. 1984), *cert denied*, 471 U.S. 1099, 105 S.Ct. 2322 (1985); *Echeverri*, 854 F.2d at 642 n. 4; *United States v. Becton*, 751 F.2d 250, 256 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018, 105 S.Ct. 3480 (1985).

The appellants contend that *Young*, *Sperling* and *Baker* are distinguishable because those cases did not involve an amendment of the indictment. We disagree. If the government was not required to allege any of the possible predicate acts in the indictment, there can be no error where it alleged all but a few of the acts. Moreover, we note that the appellants do not contend that they were in fact unable to defend against the CCE charge because they were not notified of the predicate acts that the government would seek to prove at trial. Thus, we do not agree that the indictment was constructively amended by the court's instructions. *See Canino*, slip op. at 26 (holding that there was no amendment of the indictment where the jury was instructed that it could rely on a predicate act not mentioned in the indictment to find a continuing series under § 848(d)).

Lanier, Kramer and Fischer argue that punishment marijuana trafficking under § 848(b) with life imprisonment without possibility of parole is cruel and unusual

punishment in violation of the eighth amendment. A recent decision by the Supreme Court, *Harmelin v. Michigan*, ___ U.S. ___, 111 S.Ct. 2680 (1991), has settled this issue definitively. In *Harmelin*, the petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. *Id.* at 2654. The Supreme Court rejected the petitioner's argument that the sentence was cruel and unusual within the meaning of the eighth amendment. *Id.* at 2702. The Supreme Court also rejected the petitioner's claims that his sentence was disproportionate to the crime he committed and that the sentence was void because the court was required to impose it and could not consider mitigating factors. The Court stated that: "[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further." *Id.* Thus, we find meritless the appellants' claim that their mandatory life sentences violate the eighth amendment.

IV.

Lanier, Kramer, Fischer and Bell argue that the trial court's instructions to the jury after it began its deliberations and indicated that it was deadlocked improperly coerced the jury to return a guilty verdict. The trial lasted fourteen weeks. After being instructed, the jury began its first day of deliberations at 3:00 p.m. and recessed at 10:05 p.m. On the second day of its deliberations, the jury requested to hear certain portions of the trial testimony. Before the district court could respond to this request, the foreman sent another note stating that though the jury was "still deliberating over the first defendant" it was "at

a point of deadlock." The court then read the requested testimony to the jurors. A later note from the jury asked whether "defendants Lanier, Kramer and Fischer [could] be convicted on the original indictment of 848(a) only and not on 848(b)." Before the jury retired, the court instructed that the jurors "must follow the instructions I have previously given with regard to the superseding indictment filed January 26, 1988, only."

On the third day of deliberations, the jury sent a note to the court which stated: " . . . Regarding defendant Bell, Count 2, we're deadlocked eleven to one. Regarding defendants Lanier and Kramer, Count 1, we are deadlocked eleven to one. Regarding defendant Fisher [sic], Count 1, we have not taken a final vote." A short time later, the jury informed the court that: " . . . We have taken – taken the final vote on Fisher [sic], Count 1. It is the same as the others, deadlocked, eleven guilty, one not guilty. If you wish further deliberations, we respectfully request that it begin at 9 a.m. tomorrow. . . . " The district court responded to the note by directing that deliberations would resume the next morning.

On the fourth day of deliberations, the jury announced that: ". . . . we are still deadlocked on Count 1 for defendants Lanier, Kramer and Fisher [sic]. Eleven guilty [and] one not guilty. Also, on Defendant Bell, Count 2, eleven guilty and one not guilty. . . . Any further deliberations would be to no end. . . . "

The appellants then moved for a mistrial. During the court's discussion of the note with counsel, the foreman sent another note requesting that the court give him "two more hours." The district court denied the motions for a

mistrial and sent a note to the jury which stated: "Continue your deliberations. Judge Foreman."

In denying the motions for mistrial the district court found that although the jury had been in session over the course of four days, it had spent as little as nine hours over five days actually deliberating. The court noted that the jurors often were required to wait while counsel for the government and the appellants debated the proper responses to the jury's notes.

Soon afterwards, the jury responded with a note which stated: "Your Honor, we are at a deadlock. Nothing has changed. Thank you. . . . " Appellants once again moved for a mistrial. The district court denied the motions and directed the jury to continue its deliberations. The court found that the jury had not deliberated for an adequate time in relation to the length of the trial for the court to grant a mistrial. On the fifth day of deliberations, the jury returned guilty verdicts against the appellants on all counts.

The appellants maintain that the trial judge's instruction to the jury to "continue to deliberate" violated the rule of *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973). The relevant inquiry, under *Silvern*, however, is "whether 'the court's communications pressured the jury to surrender their honest opinions for the mere purpose of returning a verdict.' " *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985) (quoting *United States v. Hamann*, 688 F.2d 507, 511 (7th Cir. 1982), *cert denied*, 460 U.S. 1013, 103 S.Ct. 1255 (1983)). On several occasions this court has held that instructions to continue to deliberate

were neutral and not coercive. In *United States v. D'Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986), we said that an instruction to "continue to deliberate" after the jury had declared that it had reached in impasse is "perfectly content neutral and carrie[s] no plausible potential for coercing the 'jury to surrender their honest opinions for the mere purpose of returning a verdict.'" *Id.* at 984 (quoting *Thibodeaux*, 758 F.2d at 203). Moreover, in *Thibodeaux*, the jury notified the court that it had reached a verdict on three counts but was deadlocked on one count. The court instructed the jury to continue deliberations for the time being, but informed the jurors that it would call them out later. *See id.* This court found that the instruction was "noncommittal" and not coercive. *See United States v. Splendorio*, 830 F.2d 1382 (7th Cir. 1987), *cert denied*, 484 U.S. 1068, 108 S.Ct. 1034 (1988) (upholding an instruction that differed from that of *Silvern* where early in the deliberations one juror stated that he believed the evidence insufficient to convict any defendant on any count).

The appellants claim that this case is different from *D'Antonio* and *Thibodeaux* because the district court knew that there was one holdout juror when it instructed the jury to continue its deliberations. We are unable to see how that makes any difference; the instruction simply did not influence the jurors to find the appellants guilty or not guilty. Indeed, the holdout juror remained free to persuade the other jurors to acquit the appellants. *See United States v. Warren*, 594 F.2d 1046, 1049-50 (5th Cir. 1979) (holding that the trial judge did not err when he instructed the jury to continue its deliberations even though he was aware of a divided preliminary vote by

the jurors); *United States v. Robinson*, 560 F.2d 507, 516-18 (2d Cir. 1977), *cert denied*, 435 U.S. 905, 98 S.Ct. 1451 (1978). Thus, we conclude that the trial judge's instructions to the jury to "continue your deliberations" were entirely proper and not in error.

The appellants further argue that the district court erred when it twice declined to declare a mistrial after the jury announced that it was "deadlocked." "The decision to grant a mistrial is within the broad discretion of the trial judge and is to be made in view of all the circumstances of the case." *United States v. Allen*, 797 F.2d 1395, 1400 (7th Cir.), *cert denied*, 479 U.S. 856, 107 S.Ct. 196 (1986); *D'Antonio*, 801 F.2d at 983. In denying the motions for a mistrial the district court found that the jury had deliberated for a very short time, perhaps as little as nine hours over four days, in comparison to the length of the trial, fourteen weeks, and that it was not hopelessly deadlocked. *See id.* (finding no abuse of discretion where the trial court denied a motion for a mistrial and instructed the jury to continue its deliberations where it reasonably believed that the jury had not devoted adequate time to its deliberations). The district court's determination that the jury was not hopelessly deadlocked after only four days was certainly reasonable given the extensive length of the trial and the multiple defendants involved. There was no abuse of discretion in the district court's refusal to grant a mistrial.

V.

Fischer argues that the district court erred under Federal Rule of Evidence 403 in admitting testimony by

an informant, C.M. Stewart, that Fischer imported 15 tons of marijuana to the United States in 1981. Fischer was not charged with any criminal offense as a result of that activity. The trial court overruled Fischer's objection and concluded that the evidence was admissible to show that Fischer intended to import marijuana on other occasions. Fischer contends that the government improperly introduced the evidence to show that Fischer had a propensity for committing drug offenses. Fischer also argues that the admission of this testimony was especially prejudicial to him because of the danger that the jury would erroneously consider the evidence in the context of the continuing series requirement of § 848.

To determine whether evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) of the Federal Rules of Evidence we follow the three part analysis set forth in *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496 (1988). *Jackson v. United States*, 886 F.2d 838, 845 (7th Cir. 1989); *United States v. Lennartz*, No. 90-1770, slip op. at 5-6 (7th Cir. Nov. 21, 1991). First, the district court must determine whether the evidence of other crimes, wrongs, or acts "is probative of a material issue other than character." *Id.* We have found inadmissible evidence used to show a defendant's bad character through a mere propensity to commit other crimes. *Id; United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984). Second, the district court must determine "whether the evidence of other crimes, wrongs, or acts is relevant under Rule 402 – as enforced through Rule 104(b)." *Jackson*, 886 F.2d at 846; *Huddleston*, 485 U.S. at 691, 108 S.Ct. at 1501-02. The evidence is relevant only if "the jury can reasonably conclude that the act occurred and that the

defendant was the actor." *Huddleston*, 485 U.S. at 689, 108 S.Ct. at 1501; *Jackson*, 886 F.2d at 846. Relevance, in part, depends on whether the other crime, wrong, or act is similar enough and close enough in time to a matter in issue. *Shackleford*, 738 F.2d at 779.

We noted in *Jackson* that if the evidence of other crimes, wrongs or acts is "relevant and offered for a proper purpose under 404(b), 'the evidence is subject only to general strictures limiting admissibility such as . . . [Rule] 403.' " *Id.* at 846-47 (quoting *Huddleston*, 485 U.S. at 687, 108 S.Ct. at 1500). We held in *Jackson* that the key factor in the Rule 403 balancing test "is plainly that relevant evidence should only be excluded if its probative value is *substantially* outweighed by any of the listed concerns in Rule 403." 886 F.2d at 847; *Shackleford*, 738 F.2d at 779; *United States v. Manganellis*, 864 F.2d 528, 531-32 (7th Cir. 1988). "In reviewing the admissibility of relevant, potentially prejudicial evidence, we view the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing the prejudicial effect." *United States v. Brown*, 688 F.2d 1112, 1117 (7th Cir. 1982); *United States v. Connelly*, 874 F.2d 412, 415 (7th Cir. 1989).

In reviewing decisions to admit evidence, the district court's "[d]iscretion, when exercised, will rarely be disturbed. . . . " *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987). We will reverse a trial court's admission of evidence under 403 and 404(b) " 'only upon a showing of abuse of discretion.' " *United States v. Chaimson*, 760 F.2d 798, 808 (7th Cir. 1985) (quoting *Brown*, 688 F.2d at 1117 (7th Cir. 1982); *United States v. Zapata*, 871 F.2d 616, 621 (7th Cir. 1989); *United States v. Liefer*, 778 F.2d 1236, 1244

(7th Cir. 1985). We note finally, that "[o]ur role on review is not to second-guess the results reached by the trial court in applying the *Shackleford* standards." *United States v. Hudson*, 843 F.2d 1062, 1065 (7th Cir. 1988).

We believe that there was an exercise of principled discretion by the district court. The district court admitted Stewart's testimony concerning Fischer's shrimp boat shipment of marijuana on the ground that it showed that Fischer intended to conspire with the other appellants to distribute more than 1,000 pounds of marijuana. *See Liefer*, 778 F.2d at 1242-43 (the defendant's specific intent to distribute was an essential element of the crime of conspiracy to distribute more than 1,000 pounds of marijuana). This satisfied the first part of the *Huddleston* analysis. Moreover, the district court did not abuse its discretion in concluding that Fischer's 1981 importation of marijuana was similar enough to the activities for which he was on trial – conspiracy to distribute in excess of 1,000 pounds of marijuana – and close enough in time – 1981 as opposed to 1983-87 – to be relevant evidence. The evidence was more than adequate to show that Fischer directed the importation of the 15 tons of marijuana on the shrimp boat, thus satisfying the second part of the *Huddleston* analysis. *See* 485 U.S. at 689, 108 S.Ct. at 1499. Third, the district court did not abuse its discretion in concluding that the prejudicial effect of Stewart's testimony, if any, did not substantially outweigh its probative value. The district court did not abuse its discretion in admitting Stewart's testimony concerning Fischer's importation of 15 tons of marijuana in 1981.

Bell contends that the district court abused its discretion in denying Bell's motion to admit in evidence certain

portions of the proffered testimony of William Palumbo. Bell contends that the government stipulated that Bell could introduce Palumbo's testimony. Palumbo was a front man for the enterprise, who helped reserve dock space in San Francisco and New Orleans. Before trial, Palumbo, a co-defendant of Lanier, Fischer, Kramer and Bell, agreed to give a proffer of his testimony to the government apparently because he wanted to demonstrate to the government that he would be a cooperative witness. Davis, an FBI agent who took the proffer from Palumbo, testified that Palumbo "told me that Kay Bell was unaware of any illegalities." At a pretrial hearing on whether Palumbo's trial should be severed from that of the other defendants, counsel for the government stated that "I'll stipulate that statement that was made by Mr. Palumbo . . . in Mr. Bell's behalf can be introduced for Mr. Bell." The government made the offer to stipulate because it hoped to prevent the severance of Palumbo's trial from that of the other appellants. Counsel for Bell, who had not previously participated in the discussion, responded: "We will accept that stipulation, Your Honor." The district court stated "okay." The hearing concluded without further discussion of the stipulation. Shortly after the hearing, Palumbo's motion for a separate trial was granted.

During the trial, when Bell moved for the admission of the stipulation, the government opposed the admission of Palumbo's testimony. Although the record is not entirely clear, it appears that the district court concluded that the government had entered into a stipulation with counsel for Bell. The district court, however, noted that the government's offer to stipulate had been made with

the assumption that Palumbo was to be tried with the other defendants. The district court denied Bell's motion to require enforcement of the government's stipulation because Palumbo was no longer a co-defendant.

We agree with the district court that the government did initially stipulate to the admission of the testimony of Palumbo, which was helpful to Bell. Even so we cannot find that the district court abused its discretion when it declined to enforce the stipulation. "As with other matters of trial management, the district court has 'broad discretion' to decide whether to hold a party to its stipulations; the district court's decision will be overturned on appeal only where the court has clearly and unmistakably abused its discretion." *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989); *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 690-91 (7th Cir. 1985). Here, the government stipulated with the assumption that Palumbo would be tried with the appellants. The circumstances underlying the offer to stipulate were altered when the district court granted the motion to sever Palumbo's trial. The district court acted within its discretion to void the stipulation.

Bell also argues that the trial court abused its discretion in not enforcing the stipulation because the stipulated testimony tended to exculpate him by contradicting proof which tended to show that Bell understood that the other appellants were engaged in a conspiracy to import marijuana. The government points out in response that Palumbo's statement was not subject to cross-examination and that the other evidence of Bell's guilt was substantial. We agree and conclude that the admission of the stipulation, while possibly helpful to Bell, would not

have made a difference in the outcome of the trial. Therefore, we conclude that the district court did not abuse its discretion in denying Bell's motion to enforce the stipulation.

VI.

The other arguments raised by appellants are without merit.

For the foregoing reasons, we AFFIRM the convictions of Lanier, Kramer, Fischer and Bell.

CUDAHY, Circuit Judge, concurring, I agree that the law of this circuit supports the affirmance of these convictions. I write separately to discuss this circuit's law on an issue touched on only tangentially in the opinion for the panel: the admissibility of other crimes evidence on the issue of intent when intent is not disputed. Fischer's intent was apparently in issue in this case, so I agree that evidence of his 1981 marijuana importation activities was admissible. However, since the government has argued that Fischer's intent was "necessary in issue" because Fischer was charged with a specific intent crime, Gov't Br. at 110, I think it appropriate to express my concerns regarding this circuit's rule on this matter.

The general rule throughout the circuits has been that in order for evidence of other crimes to be admissible to establish intent under Federal Rules of Evidence 404(b), the issue of intent must be disputed. *See United States v. James*, 555 F.2d 992, 1000 n. 46 (D.C.Cir. 1977) (citing cases from the Second, Third, Fourth, Fifth, Sixth, Eighth and D.C. Circuits); *United States v. Fierson*, 419 F.2d 1020, 1023

(7th Cir. 1969); Edward W. Cleary, *McCormick on Evidence* § 190, at 564 (3d ed. 1984) ("[I]f the prosecution maintains that the other crime reveals defendant's guilty state of mind, then his intent must be disputed."); 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* 4, 6 5242, at 489 (1978) ("The issue of intent must be seriously disputed; for example, if the defendant claims that he is not the person identified as the actor, intent is not an issue and the [Rule 404(b)] exception cannot be invoked.").

This circuit has carved out an exception to the general rule, holding that where the crime includes specific intent as an element, other-crimes evidence is admissible even though intent is not in dispute (or, put another way, intent is "automatically in issue."). *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir.), *cert denied*, 490 U.S. 1075 (1989); *United States v. Liefer*, 778 F.2d 1236, 1242-43 (7th Cir. 1985). The line of cases applying this exception extends back to *United States v. Weidman*, 572 F.2d 1199, 1202 (7th Cir.), *cert denied*, 439 U.S. 821 (1978). Other circuits generally have declined to follow suit with such an exception.[1] Most courts make no distinction between specific intent and general intent crimes, but simply apply the general rule that intent must be in issue for

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[1] Some cases in the Eighth Circuit have also held that intent need not be disputed by the defendant in specific intent crime cases in order for other crimes evidence to be admissible. *See United States v. Engleman*, 648 F.2d 473, 478 (8th Cir. 1981); *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert denied*, 434 U.S. 921 (1977).

other crimes evidence to be admitted.[2] As the Fifth Circuit has written: "If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded." United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en banc), cert denied, 440 U.S. 920 (1979) (emphasis added; footnote omitted); *see also, United States v. Figueroa,* 618 F.2d at 934, 940 (2d Cir. 1980).

In questioning the defensibility of this circuit's rule, I wrote in *United States v. Chaimson,* 760 F.2d 798, 813 (7th Cir. 1985):

> [T]he rule should not be so understood as to make the admissibility of other crimes evidence automatic where the crime is one of specific intent. Even if we adopt the fiction that intent is always in question in such cases, such evidence is only admissible if it is really introduced to show intent. The government . . . cannot simply flood the courtroom with other crimes evidence on the grounds that the crime was one of specific intent.

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[2] The Fifth Circuit has expressly rejected a distinction between specific intent and general intent crimes as "unhelpful in analyzing when such evidence properly bears on intent." *United States v. Adderly,* 529 F.2d 1178, 1180 (5th Cir. 1976).

Some courts have held that the defendant bears the burden of affirmatively removing the issue of intent from the case, generally by stipulation or concession. *See, e.g. United States v. Manner,* 887 F.2d 317, 322 & n.2 (D.C. Cir. 1989), *cert denied,* 493 U.S. 1062 (1990); *United States v. Russo,* 717 F.2d 545, 552 (11th Cir. 1983). In contrast to the approach of these cases, the specific intent exception of this circuit automatically precludes defendants charged with specific intent crimes from ever removing intent as an issue in the case, even by stipulation.

I am afraid that over the years this circuit's bright line exception has resulted in a great deal of prejudicial extrinsic evidence finding its way into many criminal trials. In my view, intent ought to be an issue *in dispute* in order for evidence of other crimes to be admissible for the purpose of establishing intent; when intent is not contested, evidence of other crimes is likely to be used simply for the prohibited purpose of showing criminal propensity. But the mere fact that a crime includes specific intent as an element does not make the issue of intent disputed. Rather, our specific intent exception has effectively swallowed the rule providing that, as evidence of intent, other crimes are not admissible unless intent is disputed or called into question. I believe that we should return to that fundamental rule.

A true Copy:
Teste:

_____
Clerk of the United States Court
of Appeals for the Seventh
Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-3444, 88-3445, 88-3446,
89-1025 & 89-2752

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, EUGENE ALBERT FISCHER, and KAY DEE BELL, JR.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois,
Benton Division

ON PETITION FOR REHEARING

(April 14, 1992)

Before FOREMAN, Chief Judge and CUMMINGS, CUDAHY, and KANNE, Circuit Judges.

The slip opinion issued in the above-entitled cause on January 30, 1992, is further amended as follows:

The first paragraph on page 11, line 8, delete the words "Since § 848(b) is a sentencing enhancement provision, "and replace them with "Because the appellants engaged in a continuing offense,".

Further, on consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause and of the answer thereto, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

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(2)

No. 92-235

Supreme Court, U.S.
FILED
NOV 2 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

KAY BELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in permitting the government to withdraw a stipulation to the admission of a hearsay statement favorable to petitioner.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 955 F.2d 479.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing was denied on April 14, 1992. Pet. App. 32a-33a. The petition for a writ of certiorari was filed on August 4, 1992, and is therefore untimely under Rule 13.1 of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846. He was sentenced to 25 years' imprisonment. The court of appeals affirmed.

1. The scope of the marijuana importation conspiracy in which petitioner was involved is summarized in the court of appeals' opinion. Pet. App. 3a-5a. The evidence showed that the conspiracy entailed the importation of massive amounts of marijuana on at least seven occasions, and that the conspirators grossed hundreds of millions of dollars as a result. Petitioner was directly involved in the importation of one barge load of 147,000 pounds of marijuana and a second barge load of 130,000 pounds of marijuana. Petitioner owned a tugboat and a business called the Harbor Sand and Gravel Yard in San Francisco, which were used in unloading the marijuana shipments; petitioner also assisted in arranging for the distribution of the marijuana from that location. The conspiracy gross-ed almost $85 million from the two shipments in which petitioner was involved. Pet. App. 4a-5a.

2. Before trial, William Palumbo, one of petitioner's co-conspirators and co-defendants, agreed to give to the government a proffer of his testimony, apparently because he wanted to demonstrate that he would be a cooperative witness if he were granted immunity. The FBI agent who took the proffer from Palumbo stated that Palumbo "told me that [petitioner] was unaware of any illegalities." At a pretrial hearing on whether Palumbo's trial should be severed from that

of the other defendants, counsel for the government stated, "I'll stipulate that statement that was made by Mr. Palumbo * * * in Mr. Bell's behalf can be introduced for Mr. Bell." The government made this offer to stipulate because it hoped to prevent the severance of Palumbo's trial. Counsel for petitioner, who had not previously participated in the discussion, responded: "We will accept that stipulation, Your Honor." The district court stated, "okay." The hearing concluded without further discussion of the stipulation. Shortly after the hearing, Palumbo's motion for a severance was granted. Pet. App. 26a-27a.

During trial, petitioner moved for the admission of Palumbo's out-of-court statement. The government objected. The district court noted that the government's offer to stipulate to the statement's admission had been made on the premise that Palumbo was to be tried with the other defendants. Because Palumbo's trial had been severed, that premise no longer was valid, and the court accordingly thought that there was no reason to enforce the stipulation. Since Palumbo's statement was inadmissible hearsay, the district court excluded it. Pet. App. 25a-27a.

3. The court of appeals affirmed, rejecting petitioner's claim that the district court abused its discretion in permitting the government to withdraw its stipulation. Pet. App. 25a-28a. The court concluded that, although the government had stipulated to the admission of Palumbo's statement, that stipulation was conditioned on petitioner and Palumbo being jointly tried. The district court therefore did not abuse its discretion in determining that changed

circumstances, namely the severance of Palumbo's trial, justified voiding the stipulation. In addition, although the court of appeals recognized that admission of Palumbo's statement would have been helpful to petitioner, the court concluded that its admission "would not have made a difference in the outcome of the trial." *Id.* at 27a-28a.

ARGUMENT

Petitioner contends (Pet. 16) that it was constitutional error for the district court not to enforce the government's stipulation to admit Palumbo's out-of-court statement.

1. Petitioner mistakenly relies (Pet. 12-16) on the government's duty to preserve evidence useful to the defense, see, *e.g.*, *California* v. *Trombetta*, 467 U.S. 479 (1984), and its duty to reveal exculpatory material to the defense, see *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Agurs*, 427 U.S. 97 (1976). Petitioner cannot contend that the government breached any such duties in this case. The cases cited by petitioner are inapposite, because they do not suggest that a criminal defendant has a right to introduce arguably exculpatory evidence even if it is inadmissible under the Rules of Evidence, and do not stand for the proposition that the government must acquiesce in the admission of inadmissible evidence.*

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* None of the cases cited by petitioner (Pet. 11-13) dealing with the right of criminal defendants to introduce evidence suggest in any way that the rule against the admission of hearsay testimony is unconstitutional when the evidence at issue is exculpatory.

Even if the government should have been held to its understanding not to object to the admission of the hearsay statement, petitioner would not have been entitled to its admission into evidence. Under the language of Fed. R. Evid. 802—which provides that "[h]earsay is not admissible except as provided by these rules"—it would not have been error for the district court to refuse to admit Palumbo's hearsay statement even if the government had failed to object to its admission. See Fed. R. Evid. 104(a) ("the admissibility of evidence shall be determined by the court").

2. The district court's decision to release the government from its stipulation was based on the premise underlying that stipulation. The district court determined that the government offered the stipulation on the understanding that Palumbo would be jointly tried with the other defendants. When Palumbo's motion for a severance was granted, the condition on which the government offered to stipulate failed, and the district court determined that it would no longer be fair to hold the government to the stipulation. The court of appeals' conclusion (see Pet. App. 27a-28a) that the district court did not abuse its discretion in so concluding does not warrant this Court's review.

Relying on this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971), petitioner claims (Pet. 16) that the government should have been held to its promise to stipulate to the admission of Palumbo's statement. *Santobello* is inapposite, however, because unlike the situation in that case, nothing in the record here suggests that petitioner detrimentally

relied on the government's representations. Petitioner gave nothing in return for the government's stipulation, and he was in no different position after the government withdrew the stipulation than he would have been if the stipulation had never been made.

Petitioner nonetheless claims (Pet. 16) that the government's offer to stipulate "operated as an inducement of the petitioner not only to not file for severance but to not pursue and secure the testimony of the co-defendant Palumbo." Those assertions find no support in the record.

Although some of petitioner's co-defendants sought a severance, petitioner did not. Petitioner made the decision not to seek a severance, however, prior to the time the government stipulated not to object to the admission of Palumbo's statement. That decision therefore could not have been motivated by the government's later stipulation. In any event, Palumbo's hearsay statement was equally inadmissible whether petitioner was jointly tried with Palumbo or separately tried. Nor does petitioner suggest any reason that his desire to introduce the statement could have served as a basis for the district court to grant him a severance.

Petitioner's claim that the government's stipulation deterred him from pursuing and securing Palumbo's testimony is also without merit. After the district court released the government from its stipulation, petitioner remained free to seek Palumbo's testimony, but there is no evidence that he did so. Moreover, as petitioner acknowledges (Pet. 19), Palumbo could not be compelled to testify without a

grant of immunity, and the government was not prepared to grant immunity to an indicted defendant. In short, the government's stipulation had no impact on petitioner's ability to persuade Palumbo to testify on his behalf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992